No. 93-1665

(3)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

RICHARD H. HUNGER, LLOYD L. BETCHER and LAWRENCE F. POSSEHL, on behalf of themselves and all other similarly situated,

Petitioners,

v.

AB, CD, EF and GH, whose true and correct names are unknown, PLAN ADMINISTRATORS, FIDUCIARIES, NAMED FIDUCIARIES, COMMITTEE MEMBERS AND TRUSTEES OF THE CLEVITE INDUSTRIES, INC. HOURLY RETIREMENT PLAN, THE PULLMAN COMPANY and CLEVITE INDUSTRIES, INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the anti-cutback provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. § 1054(g) (Supp. 1993), apply to and protect an early retirement subsidy in the absence of a plan amendment reducing or eliminating the subsidy with respect to plan participants who have not and cannot meet the age and service preconditions for the subsidy set forth in the plan document?

PARTIES TO THE PROCEEDING

The individuals and entities that are parties to this action are set forth in the caption to the case. However, in their Petition for Writ of Certiorari, Petitioners erroneously identified the petitioning parties to include "all others similarly situated" to the individually named petitioners. (Petition, at 2) The individually named Petitioners dismissed with prejudice all class allegations in the proceeding before the United States District Court for the District of Minnesota. (Stipulation and Order of The Honorable Paul A. Magnuson, March 13, 1992, reproduced in Respondents' Appendix, at 1a-3a)[1]

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, the corporate Respondents hereto, The Pullman Company and Clevite Industries, Inc., list the following parent companies and non-wholly owned subsidiaries:

The Pullman Company
Parent Company: Pullman Holding Corp.
Non-Wholly Owned Subsidiaries: None.

Clevite Industries, Inc.
Parent Company: The Pullman Company.
Non-Wholly Owned Subsidiaries: Avon-Clevite Ltd.

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1. The Appendix filed with the Petition for Writ of Certiorari omitted several documents that were part of the record before the United States Court of Appeals for the Eighth Circuit. Respondents, therefore, have submitted their appendix herewith, which consists of the omitted documents.

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STATUTE WHICH THE CASE INVOLVES

Section 204(g) of ERISA, 29 U.S.C.A. § 1054(g) (Supp. 1993), provides with added emphasis:

> (g) ***Decrease of accrued benefits through amendment of plan***
>
> (1) The accrued benefit of a participant under a plan may not be decreased by an *amendment of the plan*, other than an amendment described in section 1082(c)(8) or 1441 of this title.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of –
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. *In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy*. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

STATEMENT OF THE CASE

Petitioners Richard H. Hunger, Lloyd L. Betcher and Lawrence F. Possehl, were employed in the Engine Parts Division of Clevite Industries, Inc. ("Clevite") in Lake City, Minnesota, where they were participants in the Clevite Industries Inc. Hourly Retirement Plan (the "Clevite Plan").[1] (Complaint, ¶¶12, 19) Hereafter, petitioners are referred to as the "Plan Participants."

On February 17, 1987, Clevite sold the Engine Parts Division to JPI Acquisition, Inc. ("JPI"), a separate entity that has never had any affiliation with Clevite or The Pullman Company. As set forth in the Purchase Agreement between JPI and Clevite, JPI bought certain assets of the Engine Parts Division. JPI did not purchase other assets and did not assume liabilities or obligations of Clevite, including those relating to the Clevite Plan. The Purchase Agreement between Clevite and JPI provided that JPI shall not assume any "liabilities and obligations of [Clevite] with respect to or arising out of any . . . Pension Plans . . . or any incentive, pension, . . . or retirement plan, agreement or arrangement . . . ." (Petitioners' Appendix, at A126-A127)

Because Clevite retained all of the liabilities and assets of the Clevite Plan, JPI received no assets from the Plan. The Purchase Agreement between Clevite and JPI expressly provided:

> There shall be no transfer of assets from any Pension Plan to [JPI's] retirement plans (except as provided above with regard to the 401(k) Plan), and Transferred Employees shall look only to [Clevite] (and not [JPI]) with respect to any rights or interests they may have in any Employee Benefit Plan.

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1. Until February 14, 1987, the plan was called the Imperial Clevite Inc. Hourly Retirement Plan, at which time the name was changed to the Clevite Industries Inc. Hourly Retirement Plan. (Petitioner's Appendix, at A107-A108) Herein, the term "Clevite Plan" will be used to refer to that plan.

(*Id.*, at A164)

Under the Clevite Plan, a participant who had ceased to be employed by Clevite after having completed 10 years of service, but who at the time of his termination of employment was not age 55, was entitled to a deferred vested retirement benefit. The participant was entitled to elect to have this benefit paid at or after his or her attainment of age 55. The deferred vested retirement benefit was the participant's normal retirement benefit beginning at age 65, actuarially reduced by .5% per month for each month that the participant's benefit commencement date preceded his or her 65th birthday, for a maximum of 120 months. (*Id.*, at A40)

The Clevite Plan also provided for an early retirement benefit payable at "Early Retirement Age." A participant attained Early Retirement Age, as defined in the Clevite Plan, only if he or she completed 10 years of service while employed by Clevite and attained age 55 while employed by Clevite. (*Id.*, at A27, A39) The Clevite Plan further stated that, in order to be eligible for the early retirement benefit, a "Member" had to terminate his or her "employment with the Company" after attaining his or her Early Retirement Age (*i.e.*, age 55 and 10 years of service). (*Id.*, at A39) The "Company" was defined as Clevite. (*Id.*, at A22, A107) The term "Member" likewise was defined as a participant who was an employee of Clevite or of a company affiliated with Clevite. (*Id.*, at A23-A25)

The early retirement benefit for a participant who retired between the ages of 55 and 65 was calculated with a .2% reduction factor for each of the first 60 months by which the participant's benefit commencement date preceded his or her 65th birthday, as compared to the deferred vested benefit which was calculated with a .5% reduction factor for the same period. Like the deferred vested retirement benefit, however, the early retirement benefit was calculated with a .5% reduction for each month (up to 60) by which the

participant's benefit commencement date preceded his or her 60th birthday. (*Id.*, at A39, A77)

Thus, the early retirement benefit is greater than the actuarially reduced, deferred vested retirement benefit because the early retirement benefit was subsidized by .3% (*i.e.*, the difference between .5% and .2%) for each of the first 60 months by which the participant's benefit commencement date preceded his or her 65th birthday. Hereinafter, this .3% difference is referred to as the "early retirement subsidy."

The essence of the Plan Participants' dissatisfaction with the plan administrators' consistent interpretation of the Clevite Plan is that – contrary to the plain language of the Plan itself which has existed since at least 1981 when the Plan initially was established and at all times thereafter – the Plan Participants believe that they should be permitted to satisfy the age and service requirements for the early retirement subsidy even though they no longer are employed by Clevite (*i.e.*, by counting their service with JPI). The plain language of the Clevite Plan provides, however, that only participants who attained age 55 and completed 10 years of service *while employed by Clevite* were eligible to receive the early retirement subsidy. Any participant who had not met those criteria before the sale of the Engine Parts Division to JPI could not thereafter become eligible for the early retirement subsidy because he or she no longer was employed by Clevite.

Each of the Plan Participants is entitled to a deferred vested benefit based on a .5% reduction, rather than an enhanced benefit based on the early retirement subsidy (*i.e.*, .2% reduction).[2] At the time of the sale of the Engine Parts Division and the termination of his employment with Clevite, Mr. Possehl was 55 years old and had been employed by Clevite for approximately 5 years;

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2. The Plan Participants have been advised of their entitlement to a deferred vested benefit (Petitioners' Appendix, at A175-A201), and the instant dispute is not related to this entitlement.

thus, he failed to meet the service requirement for the early retirement subsidy. Mr. Betcher was 50 years old and had been employed by Clevite for approximately 30 years; thus, he failed to meet the age requirement for the subsidy. Mr. Hunger was 49 years old and had been employed by Clevite for approximately 9 years; thus, he failed to meet both the age and service requirements for the subsidy. (*Id.*, at A175-A201) The Plan Participants have never disputed that they failed to meet these preconditions for the subsidy while in the employ of Clevite.

On May 23, 1987, several months after the assets of the Engine Parts Division were sold to JPI and former Engine Parts Division employees had become employees of JPI, The Pullman Company acquired the stock of Clevite. Thus, the Pullman Company, which had no affiliation with Clevite or JPI, became responsible for the Clevite Plan. The Pullman Company never became the Plan Participants' employer or the employer of anyone who had worked in the Lake City Engine Parts Division, which had been sold to JPI before The Pullman Company's acquisition of the stock of Clevite. (*See id.*, at A202-A263)

The Clevite Plan, prior to The Pullman Company's acquisition, was underfunded. On January 1, 1989, The Pullman Company merged the Clevite Plan and numerous pension plans associated with other companies (the stock of which were held by The Pullman Company) to form The Pullman Company Retirement Plan (the "Pullman Plan") and transferred all assets of the Clevite Plan and the other plans to the newly formed Pullman Plan. (*Id.*, A264-A278, A279-A283) The Plan Participants, therefore, became participants in the well-funded Pullman Plan, rather than the underfunded Clevite Plan.

On or about August 1, 1991, the Plan Participants filed suit in the United States District Court for the District of Minnesota. Among other claims, the Plan Participants asserted that Respondents had violated the

anti-cutback rule of ERISA.[3] On June 30, 1992, the district court granted the Respondent's motion for summary judgment on the anti-cutback claim and denied the Plan Participants' cross-motion, holding that the Plan Participants had not and could not meet the age and service conditions for the early retirement subsidy because they no longer were employed by Clevite. Accordingly, the district court found that the anti-cutback rule did not apply. (*Id.*, at A16-A17)

The United States Court of Appeals for the Eighth Circuit agreed. On December 17, 1993, the Court of Appeals affirmed the decision of the district court, finding that the Plan Participants had failed to demonstrate both that the Clevite Plan had been amended to reduce or eliminate the early retirement subsidy, and that the Plan Participants had satisfied or could satisfy the conditions for the subsidy. The Court of Appeals, therefore, held that the anti-cutback rule did not protect the subsidy. (*Id.*, at A6-A7) On January 21, 1994, the Eighth Circuit denied the Plan Participants' application for reargument.

SUMMARY OF THE ARGUMENT

The anti-cutback rule, without ambiguity, states that a retirement-type subsidy cannot be reduced or eliminated by plan amendment if the plan participants have met or can meet the preamendment conditions for the subsidy. Thus, in the absence of an amendment to the plan, *or*, in the absence of satisfaction of the preconditions for the subsidy, the rule has no application and extends no protection to a subsidy. The Eighth Circuit

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3. On March 13, 1992, after the Plan Participants acknowledged that seven of the eight counts of the Complaint were not well-grounded in fact and law, the district court dismissed with prejudice all seven counts and the class action allegations. (Respondents' Appendix, at 1a-3a) In addition, on May 27, 1992, again after the Plan Participants acknowledged that the claim of one of the named plaintiffs (Glenn E. Johnson) was not well-grounded in fact, he agreed to dismiss his claim with prejudice. (*Id.*, at 4a-6a)

held that the subsidy at issue here was not protected by the anti-cutback rule because the Clevite Plan had not been amended and, independently, because the Plan Participants could not satisfy the preconditions for the subsidy.

The Plan Participants contend that this Court should exercise its discretion to review this case because of a conflict between decisions of the Courts of Appeals regarding the application of the anti-cutback rule to plan participants who have not met the preamendment conditions for an early retirement subsidy prior to the transfer of their employment to a successor employer. Other than the Eighth Circuit, the only Court of Appeals that has addressed this issue is the Third Circuit in *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1369, 1540 (1994), which held that a subsidy was protected. However, as the Eighth Circuit correctly found, the successor employer in *Gillis* had acquired *both* the pension plan's obligation to continue to provide the subsidy to the participants *and* the plan assets from the predecessor employer to pay for the subsidy. Unlike JPI in the instant case, which assumed neither the liabilities for the subsidy, nor the assets of the plan to pay for it, the successor employer in *Gillis* had assumed both and, therefore, had become the "plan sponsor." As the Eighth Circuit concluded, any apparent conflict between the outcomes of the two cases issues from the factual dissimilarities in their respective postures.

The Plan Participants also contend that this case presents important issues of statutory construction. However, the issues presented by this case are readily resolved based on the plain language of the statute itself, as well as the plain language of the plan document that underlies the dispute. The Eighth Circuit properly looked to these sources in rendering its decision, found no ambiguity and, accordingly, affirmed the grant of summary judgment in favor of Respondents.

The petition, therefore, presents no basis for granting a writ of certiorari and should be denied.

ARGUMENT

I. THE PLAIN LANGUAGE OF ERISA AND THE PENSION PLAN DEMONSTRATE THAT THE EARLY RETIREMENT SUBSIDY AT ISSUE IS NOT PROTECTED BY THE ANTI-CUTBACK RULE.

As the caption of the rule plainly states, the anti-cutback provision of ERISA governs a "decrease of accrued benefits through amendment of [a] plan." 29 U.S.C.A. § 1054(g)(1) (Supp. 1993). In pertinent part, the rule states that the "accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." The rule further explains that "eliminating or reducing . . . a retirement-type subsidy . . . with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits." *Id.* § 1054(g)(2)(A). Regarding a retirement-type subsidy, however, the rule imposes a limitation upon the extent to which it will be protected: "In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy." *Id.* § 1054(g)(2).

The text of the anti-cutback rule clearly establishes that it applies to a retirement-type subsidy only if two prerequisites are met. First, the plan must have been *amended to decrease an accrued benefit*. Here, the Clevite Plan was not amended to decrease the early retirement subsidy at issue. Second, the plan participants must have *satisfied the preamendment conditions for the subsidy*. The Clevite Plan imposed age and service requirements, both of which had to be met while the participant was in the employ of Clevite. The Plan Participants never met those conditions and can never meet them because they ceased to be employed by

Clevite and became employed by JPI once the Engine Parts Division was sold to JPI. Thus, as the Eighth Circuit concluded, the subsidy fails to meet either prerequisite for protection under the anti-cutback rule.

In the absence of a plan amendment which reduces or eliminates an early retirement subsidy, the anti-cutback rule does not apply. *Adams v. LTV Steel Mining Co.*, 936 F.2d 368, 370-71 (8th Cir. 1991), *cert. denied*, ___ U.S. ___ , 112 S. Ct. 968 (1992); *Oster v. Barco of California Employees' Retirement Plan*, 869 F.2d 1215, 1220-21 (9th Cir. 1988); *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1561 (D.C. Cir.), *cert. denied*, 469 U.S. 834 (1984). Nor does the mere operation of the plan language which has the effect of reducing a subsidy, absent any amendment thereto, trigger the anti-cutback rule. *Adams*, 936 F.2d at 370; *Oster*, 869 F.2d at 1221; *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 284-85 n.10 (3d Cir. 1988); *Ross v. Pension Plan for Hourly Employees of SKF Industries, Inc.*, C.A. No. C862325-A, slip op. (N.D. Ohio 1987), *aff'd*, 847 F.2d 329, 332 & n.2 (6th Cir. 1988); *Dooley v. American Airlines, Inc.*, 797 F.2d 1447, 1452 (7th Cir. 1986), *cert. denied*, 479 U.S. 1032 (1987).

The Plan Participants contend that the Third Amendment to the Clevite Plan constitutes a plan amendment that reduced or eliminated the subsidy. Their contention, however, is contrary to the language of the Amendment itself. The Third Amendment states that, with respect to Clevite employees who were hired by JPI, service for JPI would be counted only toward a deferred vested benefit. The Amendment further states that "[e]mployment with JPI would not be taken into account for purposes of determining Benefit Service or . . . for any other purposes under the Plan." (Petitioners' Appendix, at A108-A109) The Third Amendment, therefore, granted the Plan Participants the right to continue to earn service credit for purposes of the deferred vested benefit, a right they otherwise would not have had under the terms of the Clevite Plan. Moreover, with respect to

all other benefits under the Plan, including the early retirement subsidy, the Amendment merely re-stated that which the Plan already provided, *i.e.*, that service with JPI would not be counted for the subsidy or for any other benefit. In essence, the Third Amendment conferred, rather than reduced or eliminated, a benefit under the Plan.[4] Thus, as the Eighth Circuit found, the Third Amendment did not constitute a plan amendment with respect to the subsidy to which the anti-cutback rule applies. (Petitioners' Appendix, at A6-A7)

The Eighth Circuit also concluded that the anti-cutback rule did not protect the subsidy because the Plan Participants had failed to meet the preconditions for the subsidy, *i.e.*, the service and age requirements while employed by Clevite. (Petitioners' Appendix, at A6-A7)

The anti-cutback rule provides unequivocally that a retirement-type subsidy will be protected *only* if the participants meet the eligibility conditions for the subsidy. 29 U.S.C.A. § 1054(g)(2) (Supp. 1993). This limitation on the scope of the protection of the rule includes age and service eligibility preconditions. *Harms v. Cavenham Forest Indus., Inc.*, 984 F.2d 686, 692 (5th Cir.), *cert. denied*, ____ U.S. ____, 114 S. Ct. 382 (1993); *Adams*, 936 F.2d at 371; *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1528 n.12 (3d Cir. 1988). *cert. denied*, 490 U.S. 1105 (1989); *Berard v. Royal Elec., Inc.*, 795 F. Supp. 519,

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4. The Plan Participants assert, with no support from or citation to the record, that the Purchase Agreement between Clevite and JPI provided that they would continue to receive the same benefits and would continue to accrue credit toward the Clevite Plan for time worked at JPI and that Respondents chose to ignore the Agreement and amend the Plan to reduce those benefits. (Petition, at 17) As set forth above, contrary to this assertion, the Purchase Agreement provided that JPI assumed no liability or obligation with respect to the early retirement subsidy and that there was to be no transfer of assets from Clevite or its Plan to JPI. Nor did the Agreement expand in any way the accrual of benefit service under the Clevite Plan, which at all times was governed by the terms of the Plan. (Petitioners' Appendix, at A126-A127, A164)

527 (D.R.I. 1992); *Lear Siegler Aerospace Products Holding Corp. v. Smiths Industries, Inc.*, C.A. No. 88 Civ. 1528 (JMC), 1990 U.S. Dist. LEXIS 2887, at *7 (S.D.N.Y. Mar. 16, 1990).[5]

Here, the Plan Participants had not met the age and service conditions for the early retirement subsidy while employed by Clevite, as required by the plain terms of the Clevite Plan. When their employment with Clevite ceased upon the sale of the Engine Parts Division, they no longer could meet the conditions. Thus, as the Eighth Circuit held, the subsidy was not protected by the anti-cutback rule. (Petitioners' Appendix, at A6-A7)

The Plan Participants contend that neither the clear terms of the anti-cutback rule, nor the plain language of the plan document, should govern the outcome of this dispute. They assert, rather, that the legislative history and various provisions of the Internal Revenue Code – though inconsistent with the statutory anti-cutback provision and the Plan document – are controlling. Their contention, however, violates fundamental canons of statutory construction that judicial inquiry shall end with the unambiguous terms of the statute. *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987); *North Dakota v. United States*, 460 U.S. 300, 312 (1983).

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5. As discussed below, decisions holding that the anti-cutback rule will protect a retirement-type subsidy in the context of a corporate transfer, despite the participants' failure to meet the age and service eligibility conditions for the subsidy, entail the transfer *both* of the participants' employment *and the plan* to the successor employer. Thus, in such cases, the successor employer became the plan sponsor of the subsidy, and the participants, in fact, could meet the conditions for the subsidy while employed by the sponsor. *Gillis*, 4 F.3d at 1147; *Adams v. Ford Motor Co.*, C.A. 92-CV-71403-DT, 1994 U.S. Dist. LEXIS 4288, at *64 (E.D. Mich. Mar. 31, 1994). *But see Hollingshead v. Burford Equipment Co.*, 809 F. Supp. 906, 916-18 (M.D. Ala. 1992) (opinion does not discuss nature of corporate transaction relating to pension obligations pursuant to informal pension program with no written plan document).

The Internal Revenue Code provisions relied upon by the Plan Participants relate to distributions and withdrawals from qualified pension plans and favorable tax treatment afforded lump sum distributions from qualified plans, *e.g.*, 26 U.S.C.A. §§ 401(a)(14), 402(e)(4)(A) (1988 & Supp. 1993). In addition to their obvious lack of bearing on the issues presented by this case, the "separation from service" principle that the Plan Participants assert should be imported into the anti-cutback rule appears in the Code itself.[6] The anti-cutback rule, on the other hand, contains no such rule, and the plain language of the rule requiring satisfaction of the preconditions for a subsidy would be negated by the injection of such a principle.

Moreover, adopting the Plan Participants' position would abrogate the Plan terms that establish the age and service conditions for the subsidy. Congress, in amending ERISA by the Retirement Equity Act of 1984, did not intend to undermine the fundamental principles of ERISA, which dictate that the terms of the plan shall prevail in determining participants' benefits entitlement.

The Plan Participants' effort to characterize the Eighth Circuit's ruling that the anti-cutback rule does not protect the subsidy as one of "judicial legislation" is insupportable. The Eighth Circuit properly employed a straight-forward analysis that began and ended with the clear and unambiguous language of the anti-cutback rule itself, rather than engaging in an interpretation of the statutory language based on the legislative history and unrelated provisions of the Internal Revenue Code, as urged by Plan Participants.

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6. The "separation from service" principle, cited by the Plan Participants, refers to the practice under the Internal Revenue Code of treating employees transferred to a successor employer as continuing to work for the same employer for the purpose of limiting the availability of favorable income tax consequences on lump sum distributions.

The rule plainly provides that a subsidy will not be protected unless a plan amendment reduces or eliminates the subsidy and the plan participants can meet the conditions for the subsidy. Looking to the equally clear and unambiguous language of the pension plan document, the Eighth Circuit correctly concluded both that no such plan amendment had occurred and that the Plan Participants' had not met the age and service preconditions for the subsidy in the employ of Clevite, and, as employees of JPI, could not meet the preconditions. Accordingly, the Eighth Circuit held that the subsidy fell outside the scope of the anti-cutback rule's protection.

II. THE THIRD CIRCUIT'S DECISION IN *GILLIS* PRESENTS NO CONFLICT WITH THE EIGHTH CIRCUIT'S DECISION, BECAUSE, IN *GILLIS*, UNLIKE THE INSTANT CASE, THE SUCCESSOR EMPLOYER HAD BECOME THE PLAN SPONSOR OF THE EARLY RETIREMENT SUBSIDY.

The issue addressed by the Third Circuit in *Gillis* was whether the predecessor employer (the seller) had transferred sufficient assets to the successor employer (the buyer) to fund the pension obligation assumed by the successor employer to provide the early retirement subsidy to plan participants who became employed by the successor. Under these circumstances, the successor employer had become the sponsor of the plan, and the Third Circuit applied the anti-cutback rule to protect the subsidy, holding that the participants could meet the age and service conditions for the subsidy in the employ of the new sponsor. *Gillis*, 4 F.3d at 1143, 1147; *see also Gillis v. Hoechst Celanese Corp.*, 818 F. Supp. 805, 810 (E.D. Pa. 1992) (district court opinion) (pursuant to purchase agreement, successor's pension plan provided

that transferred employees are entitled to same early retirement benefit as provided under predecessor's plan).

Here, in contrast, the Clevite Plan was not transferred to JPI in connection with the asset sale. Pursuant to the terms of the Purchase Agreement between Clevite and JPI, the Plan remained at all times with Clevite. JPI assumed none of the liabilities under the Plan, and none of the assets of the Plan were transferred to JPI. (Petitioners' Appendix, at A126-A127, A164) Thus, JPI never became the plan sponsor of the early retirement subsidy. Under these circumstances, the Eighth Circuit properly distinguished *Gillis* and found its rationale inapplicable to the instant facts:

> The sale [in *Gillis*] of the division by Hoechst to American Mirrex was made pursuant to an agreement that American Mirrex would provide substantially the same employee benefits as those Hoechst had provided. Thus, the employee/plaintiffs were subsequently employed by the plan sponsor that had assumed both the obligations and assets of the retirement plan.
>
> In contrast, the transfer of the Engine Parts Division from Clevite to JPI in the instant case entailed no such agreements. JPI, the successor employer, assumed neither the obligations, nor the assets of the Plan. Instead, Clevite later sold the Plan to a third party, The Pullman Company. Thus, unlike the former Hoechst employees, the former Clevite employees ceased all employment with the sponsor of the Plan.

(Petitioners' Appendix, at A8-A9)

In their Petition, the Plan Participants readily acknowledge that Hoechst Celanese, the seller in *Gillis*, was required to transfer funds to American Mirrex, the successor employer, to fund its liability for the early retirement subsidy. (Petition, at 12) Yet, inexplicably,

they assert that the facts of *Gillis* are "indistinguishable" from the facts of the instant case. Their assertion is contrary to the facts in *Gillis*, as well as the record evidence in the instant case.[7]

For these same reasons, the decisions of the Third and Eighth Circuit, contrary to the Plan Participants' assertion, will not result in confusion in the context of asset transfers or similar corporate transactions. The Third Circuit decision stands for the proposition that when, as part of a corporate transaction, the liabilities and assets for a retirement-type subsidy are transferred to the successor employer, the subsidy may not be reduced or eliminated. This conclusion is entirely consistent with the language of the anti-cutback rule because the transferred employees will continue to work for the plan sponsor.

On the other hand, when employees cease to be employed by the plan sponsor and commence employment with a successor employer as part of a corporate transaction involving no transfer of assets and no transfer of liabilities for a retirement-type subsidy, the anti-cutback rule will not apply with respect to those employees who have not met the plan's conditions for the subsidy. Like JPI in the instant case, the successor

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7. The Plan Participants' contention that a provision of the Purchase Agreement between JPI and Clevite, taken out of context, under which JPI agreed to establish a pension plan to provide the former Clevite employees with substantially similar benefits to those under the Clevite Plan, does not support their assertion. This provision, did not operate to transfer any liability to JPI under the Clevite Plan. Rather, its effect was to ensure that, as employees of JPI, the former Clevite employees would participate in a *new* plan with *new* liabilities that were solely those of JPI, unrelated to any continuing liability or obligation under the Clevite Plan, which remained the sole responsibility of Clevite. (Respondents' Appendix, at 8a) Accordingly, the same provision of the Purchase Agreement provided that JPI "is expressly not assuming any responsibility or liability for the administration of, contributions to, continuation of or distributions from" the Clevite Plan. (Petitioners' Appendix, at A164)

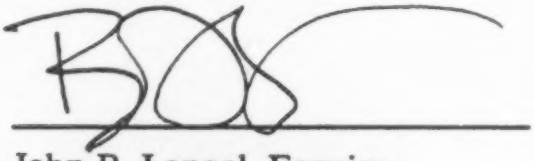
employer has not assumed the role of plan sponsor. This result is consistent not only with the plain language of the anti-cutback rule, but also with the well established principles underlying ERISA that the terms of the plan govern participants' entitlement to benefits.

Thus, contrary to the Plan Participants' assertion, these two decisions provide clear guidance for corporations in structuring such transactions and in fulfilling their obligations to plan participants following the transactions. When viewed in their proper light, the Plan Participant's "doomsday scenario" of mass confusion in corporate transactions does not exist.

CONCLUSION

WHEREFORE, Respondents request that the Court deny the Petition for Writ of Certiorari in this matter.

Respectfully submitted,



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